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In The

Supreme Court of the United States

October Term, 1933.

No. 30.

FRANK E. COOPER, as Trustee in Bankruptcy of Wauchula Central Pharmacy, Inc., Bankrupt,
Petitioner,

v.

R. F. DASHER,
Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR REHEARING.

To the Honorable Justices of the Supreme Court:

Comes now R. F. Dasher, respondent in contempt, in the above entitled cause, he being now a prisoner in the County Jail of Orange County, Florida, after serving an aggregate of 126 days as a prisoner in jail under two separate commitments for contempt issued by the senior United States District Judge in and for the Southern

District of Florida for failure to comply with the turnover order of H. P. Baya, Referee in Bankruptcy, dated the 10th day of December, 1931, which said order was affirmed by the opinion of this Honorable Court on November 6, 1933; still persisting in his innocence and within twenty-five days after entry of said judgment by this Court, petitions for a rehearing in said cause, and for other special relief as hereinafter set forth.

I.

Errors Of Fact.

Your Petitioner respectfully represents as a matter of truth as well as a matter of record in the above cause that the first postulate or sentence in the written opinion of this Court in the above cause should be corrected before said opinion becomes final in the sense that it can never be corrected.

(a) The statement of fact in said first sentence complained of, states:

> "During the night immediately following the filing of a bankruptcy petition the president of a bankrupt corporation withdrew the *bulk* of the merchandise by stealth and lodged it in hiding places known only to himself." (Italics ours.)

Whereas, an appeal to page 14 of the printed record in this cause shows that only the "merchandise" mentioned in subparagraphs 7th and 8th of the turnover order had been moved into these places during the nighttime and early morning of the night immediately following the Petition in Bankruptcy herein, and the record is silent as to whether or not that portion was the "bulk" or a minor portion.

This is the only part of the record before this Court, and no testimony is here, wherefrom we believe such an inference that the bulk or major portion of the merchandise was so moved at the time mentioned. Unless corrected future readers will read from the published opinion unwarranted addition to the record.

Neither does the record show that this respondent *personally* removed the "bulk, or any portion, of the merchandise during the night immediately following the filing of a bankruptcy petition." (Italics ours.)

In truth and in fact more than eighty (80%) per cent of the merchandise both in value and numerical pieces, found and turned over to the Receiver in Bankruptcy on the very first day of his appointment, to-wit: February 26, 1931, two days after the filing of the original petition in bankruptcy, was found in the places designated by the Referee in Bankruptcy in subparagraphs 4th and 5th of the said turnover order as the same appears on page 14 of the printed record before this Court. We regret that we cannot go outside the record to say that the Receiver has found no goods except those pointed out to him by respondent.

Your respondent further respectfully contends that such a statement in the published reports against him is quite unfair in the face of the record both to himself and to his posterity. Be this a postulate or premise, major or minor, we respectfully advise that it is in error and a decision of this Court should not be based and ultimately rest upon it.

(b) There appears as a further postulate or premise in said written opinion the following sentence with reference to merchandise turned over to the Receiver by the respondent, "Much of this would have been lost to the

creditors if it had not been *'unearthed'* from the hiding places where it had been concealed by the respondent." Considering the turnover order in its entirety as an infallible verdict and every reasonable inference therefrom *non constat* that the said Receiver *"unearthed"* any merchandise whatsoever. Your respondent therefore submits that the word "found" should not be interpreted "unearthed" in a war of words to become a lasting and permanent public record against this respondent in the published reports of the highest Court of this Country.

Your respondent, therefore, respectfully submits that in all fairness and dignity and respect for this Court that the printed record herein warrants no such a prejudicial statement against this respondent as conveyed by the idiomatic word "unearthed."

(c) Your respondent further shows that the following equivocal phrase, "Nor is the respondent yet in jail," is an unnecessary inference from a silent record. In fact at the time of the rendition of the opinion of this Court he had served 104 days as a common prisoner in jail under the first order of commitment which was only temporarily suspended on the day that the Circuit Court of Appeals allowed his appeal, to-wit: December 20, 1932, and this phrase should be eliminated.

II.

The Four Months Bankruptcy Limitation.

Is the calculation period limited by the Bankruptcy Act? What is reasonable and what is *ad infinitum* ought to be solved in this case.

Section 3 (a) of the Bankruptcy Act defines as one of the acts of bankruptcy the removing and concealing of property with intent to hinder and defraud creditors. In substance the respondent, Dasher, is so charged. Section 3 (b) specifically takes away the jurisdiction of the bankruptcy court to harass and compel poor debtors to become memory freaks or to answer in a summary tribunal on account of such acts happening more than four (4) months before the filing of the petition in bankruptcy.

Hovland v. Farmers State Bank, 10 Fed. (2) 478 (C. C. A. 8th Cir.), is one of the line of many cases under Section 3 (a) 2 in which the respondent, Hovland, was charged with transferring and secreting his property to hinder and defraud all his creditors, except one. The same four (4) months' limitation also extends to Section 3 (a) 1, and in the cases of *In re Magen Company, 10 Fed. (2) 91*, and *In re Chavkin, 249 Fed. 342*, cited by this court in the instant case, the Circuit Court of Appeals inferentially or *sub silentio* limited the fishing expedition or method of computation to four months prior to the beginning of bankruptcy, although this point of four months has apparently never been squarely raised before any appellate court until the present case. In the cited case of *In re Stavrahn, 174 Fed. 330*, there appears to have been no such process of computation for in that

case $5000.00 was actually traced to the bankrupt nearly two years after bankruptcy but before discharge.

Our position is that this case is before this court on all the issues raised before the Circuit Court of Appeals for the Fifth Circuit and it ought to be decided now whether or not a Referee may adopt a method of computation extending more than four (4) months prior to the beginning of bankruptcy and thereby indirectly compel what the apparent intention and Act of Congress forbids, notwithstanding Section 14 (b) 4 which cannot apply to a corporation or their officers. The same general prohibition or limitation of four (4) months is also repeatedly found throughout the Bankruptcy Act at Secs. 60-a, 60-b, 67-c, 67-e, 67-f and 68-b.

We, therefore, petition this court to review this cause and determine this issue which was raised in the Circuit Court of Appeals although that court reversed the most complained of portion of the turnover order on other grounds and this court did not actually pass on this vital question except perhaps *sub silentio*. The Bankruptcy Act itself limits the recovery in a summary proceeding of goods conveyed or secreted previous to four months prior to bankruptcy. *Hovland v. Farmers State Bank, supra.* We submit that if this opinion is not at least modified hereafter any mathematician, efficiency experts, accountants and other estimators, disregarding months and even years of time and lack of intimate knowledge of the business can with this unsafe and hazardous method or process with unlimited perspection *ad infinitum* conclude that every debtor, who has not had a fire, whose assets do not exceed his liabilities is guilty of misappropriations or concealment of assets.

Fortified by the unmodified decision reached by this court as it now stands in the instant case, a Referee in

Bankruptcy may with ease and impunity summarily fill the jails of this country with poor debtors with little or no possibility of an appeal under the present law from his findings of fact. The reason is that under Section 24-b of the Bankruptcy Act there is no appeal on the evidence; the citizen debtor is merely limited to an appeal "*to revise in matter of law*" only. Under the Bankruptcy Act no general appeal on the facts and evidence is authorized. Only by General Bankruptcy Order XXVII of the Supreme Court may the evidence be reviewed and in such event "the Referee shall forthwith certify to the District Judge the question presented, *a summary of the evidence* relating thereto, and the finding and order of the Referee thereon."

Surely this Court did not consider the gravity of this situation as it affects the rights and liberty of untold posterity at the hands of an inferior court officer whose office is not unlike that of the Justice of the Peace in that it is not a court of record and is the lowest in dignity in the Federal Judicial System. In fact the referee is in reality an administrative rather than a judicial officer. Secs. 2 and 33 of Bankruptcy Act. We respectfully inquire if this Court was not overly impressed with the calculated and unnecessarily prejudicial statements of the Referee in the inducement to his turnover order and thereby impatient with respondent's protest of innocence? After a cool and fair reading of the turnover order, inflammable as it first appears, is it not safe to say that the "computation method" was the only material evidence upon which the Referee based his finding and order? In the cases cited such methods of computation supplemented or corroborated other positive testimony. But in the instant case it overshadows all.

III.

Administrative Justice Should Not Be In Derogation Of Ancient and Constitutional Rights.

We respectfully submit that no Bill in Chancery would lie for the specific delivery of chattels or land under a description as vague and indefinite as the description of merchandise in the instant case. *Colson v. Thompson, 2 Wheat. 336, 4 L. Ed. 253.* Many other similar decisions may be found in *58 C. J. Secs. 96 and 106,* with notes. We submit that it is more to the public welfare that justice should be sure, definite and certain, than to permit, facilitate and invite a Justice of the Peace or Referee in Bankruptcy to dispense wildly and recklessly his own formula of justice in terms of undependable inventories, appraisements and calculations which grow less accurate when hidden by time and perplexing symbols and oracles of indefiniteness when clear and plain idiomatic English would suffice. For example, how can an innocent victim who may be caught in the snare of calculations ever extricate himself if he must resort to another tribunal to prove what the Referee intended but did not describe?

We most respectfully submit that to extend a fiction of law and ascribe to a Referee in Bankruptcy a certain infallibility in determining issues of fact in such cases as is this, especially in view of the fact that this office is by its very nature more administrative than judicial, strike at the very foundations of the citizens' liberty. The Referee in actual practice is compelled to come in contact with the Receiver, the Trustee, the detectives (when such are employed) and the Auditors. They are most frequently his appointees and as such necessarily have his confidence and his ear. In this situation it would be

strange indeed, and the Referee would have to partake somewhat of the preternatural, if their views and enthusiasms would not necessarily find reflection in the Referee's perspective when casting aside for the moment his administrative character he dons the judicial robes and sits in judgment of the citizen with a view of determining whether the suspicions and calculations of these officers outweigh the presumptions and sworn testimony of the bankrupt.

The Bankruptcy Law does not punish for failure to keep an accurate double entry system of bookkeeping and yet, when a citizen is ensnared in calculations predicated upon an insufficient set of books, coupled with the usual enthusiasms which an administrative duty invariably engenders in officers whose pay and frequently whose employment depends upon results obtained, shall it be said that in this great republic he has no alternative but to painfully submit to incarceration in the common jail, there to remain until the passage of time shall "supply the previous defect in evidence."

Turnover orders such as this are generally prepared by the solicitor in the heat and prime of victory and are calculated to embarrass the loser in the legal battles. The undersigned counsel came into this case long after the turnover order and after the order confirming same. Firmly believing, as he does, in the innocence of his client, he does not flinch to attack this order on seemingly technicalities, the proper determination of which will establish justice and prevent future wrongs to our citizenry.

In petitioning this Honorable Court to reconsider its yet tentative opinion in the above case we believe from statements appearing on the second page of the written opinion, that this Court gave undue weight to statements

of the Referee as to his view of the evidence, without considering that those statements or findings of fact are from a human being who is not infallible and the law gives no Appellate Court the opportunity to review the sufficiency thereof. Notwithstanding one District Judge may review the Referee's own summary of the testimony if the respondent bankrupt files his petition for review in our jurisdiction within ten days from the Refetee's order. As a matter of practice the Referee is always the personal appointee of the Judge and the presumption of correctness in his finding of facts is freely indulged. But that ought not to be the case when a cause is brought up on appeal under Section 24-b of the Bankruptcy Act.

No such unrestrained power of one Bankruptcy commissioner, sitting alone to punish summarily for contempt is permitted in England. *King v. Faulkner, 2 Mont. & Ayr. Cases in Bankruptcy, 311.* With the doctrine announced in *Perla v. Hubshman* and *Oriell v. Russel, 278 U. S. 358,* in combination with the opinion of this Court as now written such power in the Referee becomes an unchallengable fact as the District Judge merely becomes a quasi automaton *in limini* with no power to listen to any other reason except the order of his Referee and imprison the citizen.

No such unrestrained power should be placed in a single person in America, and if it is so unfortunately placed he should not cause the loss of liberty of the lowest culprit or citizen except upon certainty and definite information which he can repeat in idiomatic vernacular rather than calculation and suspicion as shown on the face of the turnover order about to be confirmed in this case.

Pine forte et dure and trial by ordeal were instituted to substitute for the absence of convincing evidence, posi-

tiveness and certainty. Perhaps third degree methods as frowned upon by this court in the case of *Wan v. United States (266 U. S. 1)* may sometimes be justified, but the establishment of a precedent and rule by this court to punish a citizen by imprisonment for contempt where the very face of the Referee's order admits that the evidence before him was insufficient to designate (1) where the merchandise is located, nor (2) to enable him to describe it so that a surveyor could locate it or an ordinary person, friend or relative of the respondent recognize its similarity when they see it, is, we insist, lacking the dignity of a trial by ordeal. Because in that ancient procedure the accused was in every recorded instance first acquainted with the nature and the particularity of the charges against him.

The Fourth Amendment to the Constitution of the United States provides that the right of the people to be secure in their persons, etc., shall not be violated, and no warrants shall issue *without particularly describing the place* to be searched, *and the things to be seized.* A fortiori an order or rather a verdict and judgment by one man comprising both Court and jury in an order to turn over goods the description of which he knows not whereof he speaks nor whereof they are situate.

The Sixth Amendment to the Constitution provides that in all criminal prosecutions the accused shall have a right to a speedy and public trial by an impartial jury, etc., and to be informed of the nature and cause of the accusation. Civil Contempt is "carried on in the shape of a criminal process for a contempt of the authority of the Court." *IV Blackstone 285. Sub silentio does the constitution not forbid that a contempt order be less definite than a criminal accusation?* Is there a single Court of the English speaking race which would

compel a citizen to go to criminal trial on such an indefinite charge as contained in the turnover charge of the Referee herein, in the face of a continuous, persistent objection? Indeed such a criminal punishment indirectly does what the Sixth Amendment forbids. It is the same miserable result though accomplished by a slightly different procedure.

Magnified evidentiary value, suspicion and inference is aroused in the mind of the Referee by legal acts of the respondent, such as 8 barrels of fountain syrup stored in a building 3.7 miles from his place of business in a country town. Apparently these are the disproportionate and suspicious circumstances which complete a deciding factor in aiding the Referee to reach his conclusion that the Referee did not find all of the merchandise.

The saving of warehouse rental, the failure to advise the public of his merchandise storage places, or to keep his merchandise in a public place in the heart of town seems so consistent with guilt and inconsistent with innocence that the Referee was impelled to find that a large amount of other nondescript goods, some kind, somewhere and somehow, were in hiding at the time of bankruptcy. In all fairness we submit, is that evidence of other undescribed goods unfound? Is it even safe corroboration on the ultimate fact to be solved? We think not.

VI.

The Law Should Not Presume That a Citizen Can Perform the Impossible.

The Referee did not find as a fact that the undescribed or nondescript merchandise was actually in the possession of the respondent at the time of the turnover order. We contend such a finding was necessary for its validity. (See pages 17, 18 and 20 of Record.) For aught appearing in the order it may be assumed that it directs the respondent to do the impossible which is abhorrent to the law. See *Goldstein v. Johnson, 3 Fed. (2) 228 (C. C. A. 6th Cir.); Henkin v. Fousek, 246 Fed. 285, 290;* also *Collier on Bankruptcy (12th Ed.), page 687.*

This Court in its opinion did not seem to consider the question of present possession and ability to comply with the turnover order at the time it was entered. We think it material because in the *Oriell* and *Prela cases, supra,* this Court held that the respondent can again only offer proof of the disposition of the goods *subsequent to the date of the turnover order.* The legalistic gap, or interim of 289 days from bankruptcy to the turnover in the instant case therefore still remains a forbidden anomalous obscurity insofar as the record discloses if the turnover is allowed to stand unmodified.

The reason for opening up this legalistic unexplored abyss now apparently denied by the *Oriell* and *Perla cases* in combination with the opinion of this Court as now written, becomes a thousand times more cogent since the District Judge has denied summarily (on the authority we believe of the *Oriell and Perla cases)* the petition of the respondent to show facts ascertained by him

subsequent to the turnover order to the effect *that subsequent to the time of bankruptcy but prior to the turnover order, the merchandise was never appraised by anyone appointed by the Court in accordance with Section 70-b of the Bankruptcy Act.*

In plain idiomatic English the main defense of this respondent lately discovered is that the Receiver in Bankruptcy arranged with two creditor corporations to have their regular officers and employees to jointly inventory and appraise this property on the Sunday following the receivership; that these unofficial appraisers, competent as they may be, owed no duty to the creditors, the respondent or the Court, and so fixed their appraisal at about two-thirds (2/3) of the real and true value so that they could purchase the goods at a bargain price at private sale without notice to the creditors, which they did. That this was in truth and in fact the inventory which ultimately showed a shortage in the supposed hands of the respondent and defrauded the other creditors. If the opinion of this court is modified so that this true fraud which occurred during the 289-day period can be brought to light we believe ultimate justice will be served. But we insist that the turnover order if confirmed *as is* cannot be collaterally attacked, and there is no evidence or record before this Court which would warrant this Court to presume such a shocking fraud. Unless the opinion of this Court is modified it lends aid, comfort and immunity to the very thing it was intended to quell.

How can respondent or his counsel know that their appraisal was of a complete inventory. They were not officers *of the Court.* Their self-interest conflicted with a complete inventory.

The Referee refused or failed to inquire as to that eventful period. The District Judge is forbidden to inquire or permit the respondent to disclose the happenings of that interim. This alone should reverse the turnover order as an instrument of unfairness, and containing its own refutation.

V.

Whatever Is Judicially Or Otherwise Known Can Be Described.

We take the position that even if the respondent is guilty of all that the Referee claims, or more, he is still nevertheless entitled to be tried under the regular and orderly processes of our judicial system and be informed of the charges and judgment against him in clear and idiomatic language that others may understand.

This Court in its opinion as now written refers to *evidence* and quotes from the case of *Kirby v. Talmage, 160 U. S. 379, 383,* and then states that the validity of the Referee's turnover order "is to be subjected to a kindred test." Apparently the writer of the present opinion in stating the evidence lost sight of the fact that the respondent's only remedy in this cause was a sort of limited appeal under Section 24-b of the Bankruptcy Act where no evidence can be reviewed. The above quoted case, if we read it correctly, came before this Court on the proposition whether or not land occupied jointly by a husband and wife was notice of the wife's unrecorded title to a purchaser from a third person holding a record title. *Kirby v. Talmage, supra,* was submitted to this Court on an answer in equity by Kirby which he relied upon and the Court was bound

to consider it as his sole evidence. The answer to the petition for the turnover order filed by the respondent, Dasher, surely does not receive a kindred test in the present case.

VI.

Uncertainty Is Slavery.

Conceding for the sake of argument that the certainty of a description is a nonessential and although the respondent is most certain to later call the District Court in to supply the vague and indefinite symbols, does it not seem possible that a Referee might or could render an incorrect verdict? Assuming that he could have erred, by what known method can the innocent respondent, Dasher, ever trace the goods to their present *bona fide* owners or to thieves and prove to the satisfaction of the District Judge, who has no special knowledge of their description, that this or that was what the Referee intended in his order to describe? See *Montesanto Chemical Works v. Jaeger, 31 Fed. (2) 188, aff'd 42 Fed. (2) 1018.*

We submit that from the standpoint of an innocent or even guilty respondent this finding is more inhuman than the approval of a trial or test by ordeal. To be sure it places a great and easily wielded weapon in the hands of a Referee comparable to that allowed no living king or potentate coincident with the deplorable modern trend to break down constitutional defenses and barriers long cherished. "The Future of the Constitution" by James M. Beck, American Bar Assn. Journal, September, 1933, issue.

Orders which are an enigma to counsel, a pun to the Trustee and Referee, an ambiguity to the defendant, a symbolism to the judge, nothing to the Marshal and must depend upon the credulity or the reserve power of a District Judge to interpret at a future date makes Lord Coke's declaration true indeed. This strikes with greater force when the imprisoned citizen is moved to a jail in a distant part of the state where he is more inaccessible to his counsel. But is society better served by sacrificing the defense of human liberty to facilitate the recovery of supposed nondescript property? *"It is a miserable slavery where the law is vague or uncertain."* 4 *Coke's Institutes 245.*

Words may be loosely described as symbols but nevertheless they are units of discourse and the English speaking people have developed a quite accurate vernacular. If the Referee had sufficient evidence before him to warrant the order he could have at least described the property to a degree understandable by the Court and counsel in a vernacular that at least their knowledge and experience of mind could comprehend as a fair starting point in locating and finding the property with their client in jail indefinitely awaiting the mercy or credulity of a Judge who may never see him except on the day of his commitment while carrying out a quasi ministerial obligation to jail him.

VII.

Absolute Certainty Is Not Required But Reasonable Certainty Is Necessary.

In *Dunbar v. United States, U. S. 185, 39 L. Ed. 390,* this Court had before it an indictment charging the defendant with smuggling one limited and specified class of merchandise, to-wit: "prepared opium," etc., where no demurrer or objection was even made to the description until after the verdict. Under those circumstances this Court laid down the rule that we believe has been unjustifiably expanded in this case.

Quoting from *Dunbar v. United States, supra:*

> "It is true some parol testimony might be required to show the *absolute identity* of the smuggled goods, but such proof is often requisite to sustain a plea of once in jeopardy. It is no valid objection to an indictment that the description of the property in respect to which the offense is charged to have been committed is broad enough to include more than one *specific article.*" (Italics ours.)
>
> "* * * The rule is that if the description brings the property in respect to which the offense is charged, clearly within the scope of the statute creating the offense, and at the same time *so identifies it as to enable the defendant to fully prepare his defense,* it is sufficient." (Italics ours.)

WE CONTEND THAT TWO (2) SPECIFIC IDENTIFYING TOKENS IS THE MINIMUM OF LEGAL DESCRIPTION HERETOFORE ASCRIBED TO ANY ARTICLE MEETING WITH JUDICIAL APPROVAL.

QUERY.

Does the turnover order in the instant case measure up to the rule as stated in the *Dunbar case, supra*? Could a defendant charged with murdering a human being somewhere, the name and place being only known to the defendant, fully prepare his defense under such circumstance? Would it really help matters to advise him in December that the person was one among those he had seen sometime between a year ago last May and the following February? Could a defendant charged with possession somewhere of an unnamed animal, such as is kept on farms, the description, time and place being only known to the defendant, fully prepare his defense if his counsel could not ascertain whether it was a dog or a horse?

Other hypothetical cases similar on all fours with the principle that this Court is petitioned not to ultimately adopt seems conclusive that under such a miserable slavish procedure the sacred right of defense of a citizen is whittled away to a negligible quantity indeed.

With the greatest of respect for this Court, even to the point of humility, and being advised that appellate courts seldom revise their first written opinion, but with the zeal of patriotism the writer urges that if the legal defense of citizens is thus substantially erased and the accusations of every magistrate and inferior Court is thus presumed by the Appellate Courts to be infallible and the accused a proven culprit without peradventure of a doubt our judicial system cannot long withstand the bar of public sentiment.

We submit that this Court, while this appeal is still *in limine litis* should review the record in this case, re-

verse and retract or at least revise the opinion as heretofore written so that it may more accurately describe the true situation. We further submit that this Court should in the final analysis sustain the decision of the Circuit Court of Appeals for the Fifth Circuit in the instant case.

In closing this petition counsel respectfully suggests that no brief on the merits of this case was ever filed in this Court, save and except the briefs for and against the petition for the writ.

Respectfully submitted this 27th day of November, A. D. 1933.

BURTON G. HENSON,
Counsel for R. F. Dasher,
Respondent.

CERTIFICATE OF COUNSEL.

I, BURTON G. HENSON, counsel for R. F. Dasher, do hereby certify that this petition for rehearing is presented in good faith and not for delay.

BURTON G. HENSON.